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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 855

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Petitioner,

—against—

FRANK CERESTE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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THE COURT PRESS, 130 Cedar Street, N. Y. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Petitioner,

—against—

FRANK CERESTE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, The New York, New Haven and Hartford Railroad Company, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered in the above cause on March 1, 1956, affirming a judgment of the United States District Court for the Southern

District of New York in favor of respondent, and respectfully represents:

The Opinions of the Courts Below

There was no opinion written by the trial court, except the memorandum denying petitioner's motion. In the Court of Appeals for the Second Circuit, the opinion of the Court was written by Judge Frank and separate concurring opinions were written by Judge Hincks and Judge Waterman, which appear respectively at pages 250-258, 258-259, and 259-265 of the record (Appendix) and are not yet officially reported. The memorandum and opinions are appended hereto at pages 2a and 3a through 20a, respectively.

Jurisdiction

1. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

2. The judgment of the Court of Appeals for the Second Circuit, affirming the judgment of the District Court, was entered on March 1, 1956. It is appended hereto at page 21a.

Statutes Involved

The statutes and statutory rules involved are the Federal Employers' Liability Act of 1908, as amended (Act of April 22, 1908, c. 149, § 1, 35 Stat. 65, 45 U. S. C. § 51); and the Federal Rules of Civil Procedure, as promulgated and amended pursuant to 28 U. S. C. § 2072.

The pertinent portions of these statutes and rules are appended hereto starting at page 1a.

The Questions Presented

1. Where an adult plaintiff of average intelligence in full possession of his faculties makes a clear and unequivocal statement of fact against his interest as to important matters peculiarly within his knowledge shortly after his injury and reaffirms the truth of such statement at the time of trial on cross-examination, may a verdict in his favor be allowed to stand on the strength of other testimony given by him at the trial, where such statement as reaffirmed destroys his case entirely?

2. Where a plaintiff employed in a railroad yard of a defendant allegedly is injured as a result of tripping in the daytime on a piece of coal lying in a path between two tracks, may such defendant be held liable for the injury if it was not responsible for creating any dangerous condition and had no actual or constructive notice of such a condition?

3. May a federal court in a suit under the Federal Employers' Liability Act receive matter in evidence not otherwise admissible on the ground that the rules of evidence must be more liberally applied in behalf of plaintiffs in such suits than in other suits?

4. May a federal court in following the requirements of Rule 43(a) of the Federal Rules of Civil Procedure rely on federal decisions in law as well as in equity, may it rely on decisions subsequent to 1938 when these Rules were adopted, and may it create

new law not based on state or federal precedent as to the admissibility of evidence?

Summary Statement of the Matter Involved

Respondent, an employee of petitioner, brought suit under the Federal Employers' Liability Act to recover damages for injuries sustained by him on April 11, 1949 in the course of his employment while engaged in interstate commerce.

Judgment for respondent was entered upon a verdict from the jury in his favor for $125,000. The trial court denied petitioner's motions to dismiss the complaint, for a directed verdict, for judgment notwithstanding the verdict and for a new trial. The judgment was affirmed on appeal.

The proof at the trial showed the following main facts:

Respondent was injured about 10:00 A. M. in petitioner's Oak Point Yard in the Bronx, New York, on a clear, sunny day (41, 48, 91).* This railroad yard had about ninety tracks and was about a mile long by half a mile wide (130).

Respondent walked in a westerly direction towards Bungay Bridge between track 9 and track 10, and then turned to retrace his steps (51, 90). There were cars on track 9 but none on track 10 (116, 177, 178). He took a few steps on the return trip, walking easterly, and fell (51). The path between these two tracks is shown in Exhibits 7, A and B (236, 240, 242). It was traversed an average of 45 times a day (178-179).

* Numbers in parentheses refer to pages of the Appendix.

Further facts will be presented later in the course of the argument supporting the reasons for granting the writ of certiorari.

Specifications of Error

The Court of Appeals for the Second Circuit erred:

1. In affirming the judgment of the District Court.

2. In not reversing the judgment of the District Court and ordering judgment in favor of petitioner for failure to prove its negligence.

3. In not reversing the judgment of the District Court and ordering a new trial because of prejudicial error in the reception of evidence.

Reasons Relied on for the Granting of the Writ

Petitioner believes that the writ should be granted for the following reasons:

1. *The Court of Appeals erred in failing to hold that respondent was bound by his own admissions negativing his cause of action, and its decision conflicts in principle with decisions on the same question by other courts of appeals and by this Court.*

A little over a month after his injury, respondent stated: "When I was walking back I stepped on something and I trip right over." (93, 95). When asked what caused him to stumble, he answered: "I couldn't see; I can't stop to see what the hell it was."

(95). When asked if he had noticed anything that would have caused him to fall, he replied: "Well, I couldn't see nothing. You find a lot of coal around there, and things. Sometimes I seen rocks and I push them on the side, so people won't tumble over. When I see things dangerous like that I always push them on the side." (96). When asked if he knew what caused him to fall, he said: "No." (98). On cross-examination, respondent admitted he had made such statements and agreed that they were true (93, 95, 96, 98).

On direct examination, however, respondent had claimed that he "felt something sharp" under his foot and as he fell, "a piece of coal" flew out from under his foot (51). Later, during cross-examination, he made a number of contradictory statements about how many pieces of coal were there, what size they were, where they were, and when he saw them (91-98).

It is clear that if respondent did not know what made him fall, he failed to satisfy his burden of proof and his verdict rests on mere speculation. It is petitioner's position that under the applicable principles announced in decisions of this Court and some circuit courts of appeals respondent is bound by his statement that he did not know what caused him to fall.

Railway Co. v. *McCarthy,* 96 U. S. 258 (1877);
National Steamship Co. v. *Tugman,* 143 U. S. 28 (1892);
Sturm v. *Boker,* 150 U. S. 312 (1893);
Canadian Pacific Ry. Co. v. *Sullivan,* 126 F. 2d 433 (C. C. A. 1, 1942), cert. den. 316 U. S. 696;

Ercoli v. *United States,* 131 F. 2d 354 (App. D. C., 1942);
Hartford Fire Ins. Co. v. *Carter,* 196 F. 2d 992 (10th Cir. 1952).

These cases rest their conclusions on principles of estoppel, public policy, and judicial admissions, and on analogous doctrines. These principles extend only to a very limited area insofar as testimony of a party is concerned. They do not extend to testimony given by mistake or through ignorance, or to testimony in the form of opinions, conclusions or estimates. They do apply here.

Respondent was a man of average intelligence in full possession of his faculties when he made his original statement, which was against his interest and concerned recent important events peculiarly within his own knowledge. Only he knew if he was aware of what caused his fall. He three times stated he did not know, and reaffirmed this at the trial, thereby adopting his prior admission when it was called to his attention. To allow him to repudiate such a statement, which defeats his cause of action, and to substitute a diametrically opposed statement in order to establish liability, is to lose sight of the realities of life and litigation, particularly in view of the absence of corroboration from other witnesses.

Petitioner believes that a review of this case is desirable in order to achieve a long overdue clarification as to the status and scope of these principles, which the courts below have improperly refused to apply.

2. *The Court of Appeals erred in failing to order judgment for petitioner on the ground that in the absence of actual or constructive notice of the existence of a dangerous condition not created by it which caused respondent to fall, petitioner could not be held liable, and its decision conflicts with decisions of some circuit courts of appeals and with principles laid down by this Court requiring proof of negligence as a prerequisite to liability.*

Even if it be accepted that respondent fell over a piece of coal, there is no proof in the record as to how long the piece had been there. It could have been there less than a minute if it had come from one of the coal cars which were moving past respondent on track 9 as he walked along (118, 160, 162). There is no proof that petitioner put the piece of coal there or knew it was there. There is no proof that it got there as a result of petitioner's negligence. There was no reason to foresee harm to respondent in broad daylight from a piece of coal.

Respondent's testimony that he saw a lot of coal scattered around in the vicinity a week before the accident (84-85) is too vague and remote to serve as a basis of constructive notice. Many men used the path daily and would clear the path as they walked or collected the coal for use in various stoves (24, 96, 178-179). A condition so subject to change could not be presumed to continue, and there was no proof that the condition remained unchanged in the interval.

Testimony as to coal being seen at various places in the yard at various times prior to respondent's fall has no bearing on whether petitioner had notice of the presence of the piece on which he stumbled.

If petitioner is held liable from the moment a piece of coal touches the ground, it is an insurer of the safety of that place because it then is given no opportunity to learn of its presence and remove it if dangerous.

The decision in the case at bar is in conflict with decisions in other circuit courts which require notice of a dangerous situation as a condition precedent to liability except where the owner creates the danger, since to hold otherwise would make the owner a guarantor of the safety of his premises.

Hatton v. *New York, N. H. & H. R. Co.,* 261 Fed. 667 (C. C. A. 1, 1919);
Baltimore & Ohio R. Co. v. *Flechtner,* 300 Fed. 318 (C. C. A. 6, 1924), cert. den. 266 U. S. 613;
Chicago & N. W. Ry. Co. v. *Payne,* 8 F. 2d 332 (C. C. A. 8, 1925);
Cookingham v. *United States,* 184 F. 2d 213 (3d Cir. 1950), cert. den. 340 U. S. 935;
Shannon v. *Union Barge Line Corp.,* 194 F. 2d 584 (3d Cir. 1952), cert. den. 344 U. S. 846;
Kaminski v. *Chicago R. & I. R. Co.,* 200 F. 2d 1 (7th Cir. 1952);
Webb v. *Illinois Central R. Co.,* 228 F. 2d 257 (7th Cir. 1955).

The decision is likewise in conflict with earlier decisions of the Second Circuit Court of Appeals requiring notice.

Schilling v. *Del. & H. R. Co.,* 114 F. 2d 69 (C. C. A. 2, 1940);

Boyce v. *Seas Shipping Co.*, 152 F. 2d 658 (C. C. A. 2, 1945);
Guerrini v. *United States*, 167 F. 2d 352 (2d Cir. 1949), cert. den. 335 U. S. 843;
Miller v. *Sultana*, 176 F. 2d 203 (2d Cir. 1949), cert. den. 338 U. S. 907.

The decision is generally opposed by the terms of the statute and the decisions of this Court requiring proof of negligence which caused the injury as a prerequisite to liability under the Federal Employers' Liability Act.

The argument in the opinion below of Judge Frank that proof of actual or constructive notice was not necessary (252) should be repudiated at once by this Court before it does any harm as a precedent in other cases. There is no proof here to show that petitioner intentionally put the piece of coal where respondent tripped over it, or that it got there as a result of negligence on the part of petitioner. Such proof in itself would have demonstrated knowledge and eliminated the necessity of showing actual or constructive notice. Absent such proof, petitioner may not be held liable unless it knew or should have known of the presence of a dangerous condition arising from the piece of coal in time to have removed it or warned respondent of it. No amount of knowledge on petitioner's part of coal falling in the yard at other times would give it the requisite notice that this particular piece had fallen so it could remove it.

Judge Frank's reference in footnote 2 to two cases in support of his argument (252) is not apposite, since in each case the railroad defendant intentionally

or carelessly created the danger, either by discharging clinkers from its engines, as in *Southern Ry. Co.* v. *Puckett,* 244 U. S. 571 (1917), or by throwing coal on the ground, as in *Tash* v. *St. Louis-San Francisco Ry. Co.,* 335 Mo. 1148, 76 S. W. 2d 690 (1934).

3. *The Court of Appeals erred in holding that proof of a habit of negligence of petitioner was admissible in evidence, even though not admissible under state or federal law, on the ground that plaintiffs in cases under the Federal Employers' Liability Act must be granted greater freedom of proof than plaintiffs in other cases, and in this respect its decision fails to accord with prior decisions of other circuit courts and of this Court.*

The opinion of Judge Frank below states that the trial court admitted certain evidence of petitioner's past conduct, over petitioner's objection, because it showed a habit of negligence (253); that most courts have held such evidence inadmissible (254); that certain writers on evidence such as Wigmore and McCormick have urged that such evidence should be received (254-256); that because the Federal Employers' Liability Act has been construed by this Court in a manner most generous to employees, the law of evidence favored by these writers ought to be followed, in the absence of a contrary decision of this Court, even though the same law might not be applied in other kinds of cases (256-257).

This view of the law was rejected by the concurring opinion of Judge Waterman as erroneous and unfortunate (265). It is a view of the law which was expressly rejected in two recent cases brought under the Federal Employers' Liability Act: *Atlantic Coast*

Line R. Co. v. *Dixon,* 207 F. 2d 899 (5th Cir. 1953) and *Schillie* v. *Atchison, T. & S. F. Ry. Co.,* 222 F. 2d 810 (8th Cir. 1955).

Such a doctrine has never been advanced by this Court. The two decisions of this Court referred to by Judge Frank in support of his argument (257) deal not with rules of evidence but with matters such as burden of proof and construction of pleadings on a motion to dismiss that are substantive in nature since they determine the outcome of the litigation. Many years ago this Court held in *Central Vt. Ry. Co.* v. *White,* 238 U. S. 507 (1915), that burden of proof in a case under the Federal Employers' Liability Act is a substantive matter, but pointed out (page 511) that rules of evidence are not.

The implications and ramifications of Judge Frank's views are so far reaching and disturbing that prompt correction by this Court is required.

4. *The Court of Appeals erred in its interpretation of Rule 43(a) of the Rules of Civil Procedure with respect to the admission of evidence, and its interpretation is contrary to that of other circuit courts.*

The concurring opinion of Judge Waterman questions whether Rule 43(a) of the Federal Rules of Civil Procedure limits the trial court to the rules of evidence applicable in state courts, prescribed by a federal statute, or derived from federal equity suits prior to the adoption of the Federal Rules (261-262). The Rule itself provides, 28 U. S. C. Rule 43(a):

> "All evidence shall be admitted which is admissible under the statutes of the United States, or

> under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made."

Judge Waterman then suggested in footnote 3 (262) that, under pre-1938 federal decisions in actions at law, evidence of a habit of negligence might have been admissible. The decisions which he cites are not at all in point, particularly in view of the highly prejudicial nature of evidence as to habits of negligence as compared with other habits, and he quite overlooked numerous contrary federal decisions:

Southern Bell Tel. & Tel. Co. v. *Watts,* 66 Fed. 460 (C. C. A. 4, 1895);
Baltimore & Ohio R. Co. v. *Henthorne,* 73 Fed. 634 (C. C. A. 6, 1896);
Central Vermont R. Co. v. *Ruggles,* 75 Fed. 953 (C. C. A. 1, 1896);
Harriman v. *Pullman Palace Car Co.,* 85 Fed. 353 (C. C. A. 8, 1898);
Louisville & N. R. Co. v. *McClish,* 115 Fed. 268 (C. C. A. 6, 1902);
Robinson v. *Denver City Tramway Co.,* 164 Fed. 174 (C. C. A. 8, 1904);
Arizona & N. M. R. Co. v. *Clark,* 207 Fed. 817 (C. C. A. 9, 1913);
Cf. *Thompson* v. *Bowie,* 4 Wall. 463 (1866).

Judge Waterman then sought support from the law of New York, but here again, after conceding that numerous decisions were contrary to his position, he suggested reliance on an entirely inappropriate series of decisions dealing with custom and practice. He failed to refer to such additional contrary decisions as:

Cleghorn v. *N. Y. Central & Hudson River R. Co.*, 56 N. Y. 44 (1874);
Baulec v. *N. Y. & Harlem R. Co.*, 59 N. Y. 356, 360 (1874);
Eppendorf v. *Brooklyn City & N. R. R. Co.*, 69 N. Y. 195 (1877);
Engel v. *United Traction Co.*, 203 N. Y. 321 (1911);
Wooster v. *Broadway & Seventh Ave. R. Co.*, 72 Hun 197 (1st Dept., 1893);
Veeldorano v. *Union Ry. Co.*, 189 App. Div. 238 (1st Dept., 1919);
Flannagan v. *Brown*, 211 App. Div. 694 (1st Dept., 1925);
Lizzo v. *O'Connor*, 286 App. Div. 1021 (2nd Dept., 1955).

Since it is clear that evidence of a habit of negligence is inadmissible under New York law and federal law, such evidence should have been excluded without further search for authority.

Hartford Accident & Indemnity Co. v. *Carter*, 110 F. 2d 355 (C. C. A. 5, 1940);
Mosson v. *Liberty Fast Freight Co.*, 124 F. 2d 448 (C. C. A. 2, 1942);
Roth v. *Swanson*, 145 F. 2d 262 (C. C. A. 8, 1944);

Wright v. *Wilson,* 154 F. 2d 616 (C. C. A. 3, 1946), cert. den. 329 U. S. 743;
Potlatch Oil & Refining Co. v. *Ohio Oil Co.,* 199 F. 2d 766 (9th Cir. 1952), cert. den. 345 U. S. 926.

It is also true that if New York law excluded the evidence and no federal law affirmatively made it admissible, or if federal law excluded it and no New York law affirmatively made it admissible, the evidence should not have been received.

National Battery Co. v. *Levy,* 126 F. 2d 33 (C. C. A. 8, 1942), cert. den. 316 U. S. 697;
Gordon v. *Robinson,* 210 F. 2d 192 (3d Cir. 1954);
Schillie v. *Atchison, T. & S. F. R. Co.,* 222 F. 2d 810 (8th Cir. 1955), *supra.*

See

Atlantic Coast Line R. Co. v. *Dixon,* 207 F. 2d 899, 903 (5th Cir. 1953), *supra.*

The opinion of the court below by Judge Frank conflicts with the principles applied by these other circuit courts and accordingly should be reviewed by this Court, which may at the same time establish the correct interpretation of Rule 43(a), as to which doubt has been raised by the opinion of Judge Waterman.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT M. PEET,
Attorney for Petitioner.

E. J. MOORE,
J. G. PARÉ,
Of Counsel.

Statutes Involved

Section 1 of the Federal Employers' Liability Act of 1908, as amended (Act of April 22, 1908, c. 149, § 1, 35 Stat. 65, 45 U. S. C. § 51) reads as follows:

> "Every common carrier by railroad while engaged in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Rule 43(a) of the Federal Rules of Civil Procedure, 28 U. S. C., reads in part as follows:

> "All evidence shall be admitted which is admissible under the statutes of the United States,

or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made."

Memorandum of Murphy, *D. J.*

[SAME TITLE]

Defendant's motions made at the close of plaintiff's case and at the close of the entire case are denied with appropriate exceptions to defendant.

Dated, New York, N. Y., December 10, 1954.

THOS F MURPHY
U. S. D. J.

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 55—October Term, 1955.

(Argued October 10, 1955 Decided March 1, 1956.)

Docket No. 23529

FRANK CERESTE,

Plaintiff-Appellee,

—v.—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Defendant-Appellant.

Before:

FRANKS, HINCKS and WATERMAN,

Circuit Judges.

Appeal from a judgment for plaintiff entered on a verdict by the United States District Court for the Southern District of New York, Judge Murphy presiding. AFFIRMED.

COHEN & FUCHSBERG (Jacob D. Fuchsberg and B. Hoffman Miller, of counsel), *for appellee.*

ROBERT M. PEET (Frank A. Fritz and John G. Paré, of counsel), *for appellant.*

Opinion

This is a suit by plaintiff, an employee of the defendant railroad company, under the Federal Employers' Liability Act, 45 U. S. C. Section 51 *et seq.* Plaintiff, while working for defendant in defendant's railroad freight-yard, operated and controlled by defendant, suffered injuries necessitating amputation of one of his legs above the knee. The jury returned a verdict for $125,000. From a judgment on this verdict defendant appeals.

Plaintiff testified that on April 11, 1949, he was walking in the freight-yard along a path that ran between two parallel sets of tracks; that the path was strewn with pieces of coal; that plaintiff tripped over a lump of coal in the path, lost his balance and came in contact with a moving freight-train on one of the tracks, as a result of which his leg was badly crushed and had to be amputated. One of defendant's witnesses testified to seeing coal near the place where plaintiff fell, shortly after the accident, and several witnesses testified that a photograph, introduced as an exhibit, which showed coal so strewn along the path, fairly represented the condition at about the time of the accident. Over objection by defendant, there was admitted the deposition testimony of some of defendant's other employees to the effect that cars loaded with coal were continually being shuttled back and forth on the tracks in the yard and particularly the tracks on either side of the path, and that, in the process of moving the cars about, they were made to bump against one another so the coal would fall upon the paths between the tracks.

Also over defendant's objection, it was testified that there had been complaints to defendant of the

lack of cleanliness of the yard; that there was debris around the tracks dangerous to employees in 1947 and 1948; that the same employees used in cleaning up operations were also used on construction and maintenance jobs; that at times a substantial part of these employees had been assigned to construction or maintenance work; and that this was true in April 1949 and for several months before the accident.

FRANK, *Circuit Judge:*

1. The evidence sufficed to support a verdict that defendant had been negligent in not providing defendant a safe place to work. It was for the jury to determine whether the presence on the path of the coal, on which defendant tripped, constituted negligence.[1]

2. Defendant, on cross-examination of plaintiff, brought out evidence tending to show that, before trial, he had stated to some of defendant's representatives that he did not know what caused him to stumble. Defendant offered no written statement signed by plaintiff. Even if we assume that this pretrial statement flatly contradicated his trial testimony, the jury, of course, could disregard the former and believe the latter.

3. It might be argued that actual or constructive notice to defendant was not necessary since de-

[1] *Southern Ry. Co.* v. *Puckett*, 244 U. S. 571; *Brown* v. *Western Ry. of Alabama*, 338 U. S. 294; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54; *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350.

fendant had control of the premises and therefore its conduct was the sole cause of the dangerous condition found by the jury to have existed at the time of the accident.[2] But we need not consider that argument since the evidence of such notice was ample.

Several of defendant's employees testified that, in April 1949 and previously, they had seen coal falling on the path between tracks 9 and 10 from coal cars bumping against one another. We think it was not error to receive evidence as to coal thus falling in other parts of the yard or at times other than April 1949, for such evidence was relevant as showing the practice as a result of which coal was likely to be found on the path were the accident occurred. But even if reception of this evidence was error, it could not have been prejudicial in the light of the overwhelming proof that coal had so fallen on that path at the approximate time of the accident. Moreover, constructive notice to defendant was also shown by plaintiff's testimony that he had seen coal scattered along that path one week before the accident.

Evidence was received that an employees' Safety-First Committee had notified the defendant in 1947 and 1948 that coal scattered in its yard constituted a menance to the employees working there. Since the accident occurred on April 11, 1949, we do not think that this evidence was too remote. Nor did the defendant object to it on that basis but solely because it was not limited to the area of the accident. However, we think that evidence of the complaints, which

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[2] See *Southern Ry. Co.* v. *Puckett*, 244 U. S. 571; *Tash* v. *St. Louis-San Francisco Ry. Co.*, 76 S. W. (2d) 690, 335 Mo. 1148. But cf. *Baltimore & Ohio Ry. Co.* v. *Flechtner*, 300 Fed. 318 (C. A. 6).

referred to the condition of the yard as a whole, was admissible to show that defendant had notice of the condition of the path between tracks 9 and 10, a subject which apparently was included in the Committee's general complaint.

4. The trial judge admitted evidence of past conduct of the defendant, apparently because it showed a habit of negligence. Thus testimony was admitted, over defendant's objection, that a substantial number of defendant's employees assigned to clean-up and construction work had been used solely for construction work in April, 1949 and previously; that only a small force had been left in the Oak Point yard, where the accident occurred, to take care of emergencies; and that clean-up operations did not normally constitute an emergency.

In negligence cases not based on FELA, most courts have held such evidence inadmissible.[3] Wigmore says, "Of course, in all other affairs of life, except in a court-room, one does give weight to what one knows of a person's careful or negligent character, in judging upon the probable facts." Noting that the courts, in rejecting such evidence, do so because "there is too much risk" of prejudicing juries, he remarks, "Nevertheless, it seems unreasonable to exclude what may be useful evidence."[4] And he says also, "To evidence a party's conduct that has led to a personal injury, a habit of certain careful or negligent conduct has probative value."[5] A considerable number of

[3] McCormick on Evidence (1954) pp. 325, 342; 1 Wigmore, Evidence (3d ed.) Sections 65, 97.

[4] Wigmore, Evidence, Students' Textbook (1935) Section 35.

[5] *Ibid.* Section 43.

decisions hold such evidence admissible when there were no eyewitnesses to the occurrence.[6] This exception lacks reason; for, if the evidence is highly prejudicial, it is no less so when eyewitnesses are unavailable.

McCormick, in his recent thoughtful treatise on Evidence (1954), says (Section 162): "Character and habit are close akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. 'Habit,' in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway-cars while they are moving. The doing of the habitual acts may become semi-automatic. Character may be thought of as the sum of one's habits through doubtless it is more than this. But unquestionably the uniformity of one's response to habit is far greater than the consistency with which one's conduct conforms to character or disposition. Even though character comes in only exceptionally

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[6] See *Boone* v. *Bank of America Association*, 29 P. (2d) 409, 220 Cal. 93; *Young* v. *Patrick*, 153 N. E. 623, 323 Ill. 200; *Toledo St. L. & K. C. Ry. Co.* v. *Bailey*, 33 N. E. 1089, 145 Ill. 159; McCormick on Evidence (1954) p. 342.

as evidence of an act, surely any sensible man in investigating whether X did a particular act would be greatly helped in his inquiry by evidence as to whether he was in the habit of doing it. We are shocked, then to read such judicial pronouncements as the following: 'For the purpose of proving that one has or has not done a particular act, it is not competent to show that he has or has not been in the habit of doing other similar acts.' But surely, if 'habit' is used in the sense we have suggested above, expediency and sound reason would lead to the opposite approach, namely, that evidence that an act was habitually done by X under like circumstances will be received as evidence that it was done by X on the particular occasion. Nevertheless, the judge should possess the discretion usual in this field of circumstantial evidence to exclude if the habit is not sufficiently regular and uniform, or the circumstances sufficiently similar, to outweigh the danger, if any, of prejudice or confusion. The reluctance of some courts to accept this view of the general admissibility of habit to show an act, and the doctrine of other courts that evidence of habit will be received only when there are no eyewitnesses, are probably due to a failure to draw a clear line between character and habit. This is contributed to by the popular custom of describing character in terms of 'habits,' such as 'habits of care' or 'habits of intemperance.' In consequence these courts mistakenly apply to evidence of specific habit, the restrictions developed for the far less probative and more prejudicial evidence of character. On the other hand, evidence of the 'custom' of a business organization or establishment, if reasonably regular and uni-

form is usually received much more willingly by the courts, perhaps because there is here no temptation to confuse this with evidence of character. Thus it is usually held that when a letter has been written and signed in the course of business and placed in the regular place for mailing, evidence of the custom of the establishment as to the mailing of such letters is receivable as evidence that it was duly mailed. Proof of the existence of the person's habit or of the custom of the business may be made by testimony of a witness to his conclusion that there was such a habit or practice. It also may be made by evidence of specific instances, though these later would be subject to the judge's discretion to require that the instances be not too few or too many, and that the time be near and the circumstances be sufficiently similar." See also Model Code of Evidence (A. L. I. 1942) Rule 307; Uniform Rules of Evidence (1953) Rule 50.

The Supreme Court has construed FELA in a manner most generous to employees,[7] presumably on the theory that the statute expresses a policy of unusually high regard for their protection. Absent any Supreme Court decision under FELA excluding evidence of a habit of negligence, we think we should accept the more rational view; and we therefore hold that the

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[7] *Cahill* v. *N. Y. N. H. & H. R. Co.*, 224 F. (2d) 637, reversed 350 U. S. 898; *Lavender* v. *Kurn*, 327 U. S. 645; *Jesionowski* v. *Boston & Maine R. Co.*, 329 U. S. 452; *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649; *Lillie* v. *Thompson*, 332 U. S. 459; *Johnson* v. *United States*, 333 U. S. 46; *Wilkerson* v. *McCarthy*, 336 U. S. 53; *Affolder* v. *N. Y. C. & St. L. R. Co.*, 339 U. S. 96; *Stone* v. *N. Y. C. & St. L. R. Co.*, 344 U. S. 407; *Smalls* v. *Atlantic Coast Line R. Co.*, 348 U. S. 946; see also *Ruddy* v. *N. Y. Central*, 224 F. (2d) 96, 98 (C. A. 2); *Korte* v. *N. Y. N. H. & H. R. Co.*, 191 F. (2d) 86, 88 (C. A. 2); *Louisville & N. R. Co.* v. *Botts*, 173 F. (2d) 164, 166 (C. A. 8).

trial judge did not "abuse" his discretion in receiving this evidence. Cf. *Brown* v. *Western Railway of Alabama*, 338 U. S. 294 (strict construction of the complaint by a state court, under state rules of practice, in an action under the F. E. L. A. is not binding on the Supreme Court on appeal from a dismissal of the complaint); *Garrett* v. *Moore-McCormack Co., Inc.*, 317 U. S. 239 (burden of proof imposed by Pennsylvania law upon one attacking the validity of a written release is not applicable to seaman suing in the Pennsylvania courts under Section 33 of the Merchant Marine Act). The writer of this opinion thinks we need not now decide whether we should apply the same evidence rule in cases not arising under F. E. L. A.

Aside, however, from the question of whether this evidence was admissible as tending to show a habit of negligence, it was relevant to show that clean up operations were not properly performed shortly before the accident. There was ample evidence showing that coal was present on the paths between tracks 9 and 10. There was also testimony in the record that only enough men were left in the Oak Point yard in April, 1949, and prior thereto, to take care of emergencies; and that clean up operations did not normally constitute an emergency. This evidence tended to show that clean up operations were not performed adequately, if at all, at the approximate time of the accident. It was therefore relevant evidence and not too remote. Accordingly, its admission was not error.

5. Defendant made no request for a charge concerning notice. Accordingly, the judge did not err in

his charge on that subject (quoted in the footnote),[8] especially as defendant did not except.

Judgment affirmed.

HINCKS, *Circuit Judge* (concurring):

Over objection evidence was received that on one occasion "within a period of several months before April 11, 1949" the defendant shifted 75 maintenance workers, on whom it relied for clean-up as well as maintenance work, from the Oak Point Yard to Van Ness, leaving 4 or 5 at Oak Point. Neither then nor thereafter was evidence offered that the number left at Oak Point was at any time inadequate for clean-up as well as maintenance tasks. This evidence, standing by itself, I think inadequate to prove the "habit" or "custom" of the defendant. As Wigmore noted, §376, even in jurisdictions which admit evidence of habit, prior instances to have probative effect, must be shown not only to be numerous enough to furnish ground for inference but also "to have occurred under substantially similar circumstances so as to be naturally accountable for by a system only, and not as casual recurrences."

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[8] "Defendant's position is that it had no notice, real or constructive, of the presence of coal on the path, or, more particularly, the piece of coal upon which the plaintiff claims to have slipped.

"Defendant also argues that there is no proof, other than the testimony of the plaintiff, as to how long such coal or piece of coal was present, and that, accordingly, it cannot be held responsible since there was nothing that it did or could have done to prevent this accident. It also offered testimony that there was in fact no coal at the place where plaintiff was lying after the accident."

Moreover, in my opinion, this evidence had no probative force whatever in support of the appellant's contention that the defendant was negligent in the discharge of its duty to keep the yard reasonably safe for its workers. However, the evidence was admitted *subject to connection*. That ruling, I think, was not erroneous: for aught that then appeared, the evidence might later have been supplemented by evidence of further similar instances and, more important, by evidence that a working force of only 4 or 5 employees was inadequate to keep the Oak Point yard reasonably free from dangerous litter. At the time the evidence was received, appellant's counsel sought no promise by opposing counsel that it would subsequently be connected, nor at the close of the evidence, when it was apparent that no connecting evidence had been offered, did he move to strike. These factors considered, I think that the appellant is not entitled to complain of any prejudice resulting from the admission of this evidence.

As to all other claims of error I have no disagreement with my brothers.

WATERMAN, *Circuit Judge* (concurring):

Judge Hincks and I concur in the result reached by Judge Frank in his opinion for the Court. However, our reasons for affirming the admission of certain evidence introduced by the plaintiff and objected to by the defendant differ sufficiently from those of Judge Frank and from those of each other so that I think it not inappropriate to append a separate statement of my views.

Opinion

The evidence in question falls into four categories: (1) evidence concerning the general practice or custom of the defendant during and prior to April, 1949, when the injury sued upon occurred, of making cleanups and of making up trains containing coal cars in the railroad yard where the injury occurred; (2) evidence that coal had been see on and between the tracks in such yard during April, 1949; (3) evidence that complaints were made to a safety committee of the defendant during 1947 and 1948 concerning debris and litter in such yard; and (4) evidence tending to show that prior to and during April, 1949, very few maintenance employees were available to do cleanup work in such yard because of transfers of men to jobs in other places.

1. *Evidence of Custom of Defendant of Making Cleanups and of Making Up Trains Containing Coal Cars.*

Various employees of the defendant were permitted to testify concerning the general practice of the defendant during and prior to April, 1949, concerning: (a) a procedure of cleaning up debris in the yard, including the path between tracks 9 and 10; (b) the method of making up trains containing coal cars; (c) the method of transferring coal from a defective car to a good car; (d) the use of tracks 9 and 10 as well as other tracks to make up trains containing coal cars; and (e) the method utilized by the defendant of coupling coal cars by impact, so that coal could be

dislodged from coal cars and fall to the tracks.[1] All of this evidence was offered by the plaintiff to corroborate his testimony that his injury had been caused by tripping over a large piece of coal left by the defendant in the path between two tracks. It tended to show that pieces of coal might be present in the yard, and hence it bolstered the plaintiff's own statement that there was a piece of coal at the particular place of injury. It also tended to show that the defendant was aware that coal could litter the yard and that the defendant had a procedure for handling this problem.

I think it clear that this evidence as to the general practice or custom of the defendant was logically relevant, *i.e.*, it was probative of the issue of whether or not a defective condition existed.[2] Assuming the relevance of this evidence, the problem is then one of weighing the probative character of the evidence against the disadvantages attendant upon its admission. The dangers of this type of evidence are patent: it raises issues which tend to become progressively more remote from the narrow factual issue before the

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[1] All of this evidence was offered and admitted before there had been any proof of a defective condition in the path at the time of the accident. The trial judge realized this and so told the jury. He admitted the evidence subject to the condition that it be tied up by evidence showing a specific defective condition at the exact time and place of the injury. This condition was later fulfilled.

[2] Proof of the existence of these customary practices was made in the form of conclusions on the part of defendant's employees that there were such practices. This is the method usually employed. See, e.g., *Security Mut. Life Ins. Co.* v. *Kleutsch*, 8 Cir., 1909, 169 Fed. 104; *McCormick on Evidence* (1954) 343. The testimony indicates that these practices were repeated on numerous instances, some of them many times daily.

jury; it may consume an unnecessary amount of time and confuse the triers of facts; and it may prejudice the opposing party by showing its negligence in general or in respects which did not cause the particular injury in suit. But I think that this weighing of factors is a function that should remain, by and large, in the discretion of the trial judge. Only in the most extreme case should we upset a determination on his part that the probative value of the evidence outweighs the dangers it carries. In the instant case I cannot say that the trial judge abused the broad discretion which it was his part to exercise.

It may be that Rule 43(a) of the F. R. C. P. requires us to search out and apply the applicable state rule of evidence here—absent a more lenient rule prescribed by a United States statute or derived from federal equity suits before the adoption of Federal Rules. See *Schillie* v. *Atchison, T. & S. F. R. Co.*, 8 Cir., 1955, 222 F. 2d 810. I am not certain either that Rule 43(a) completely eliminates any creative power on our part to modify rules of evidence applicable in federal court or that it would be erroneous for us to draw evidence rules from actions at law in the federal courts before the adoption of the Federal Rules.[3] Be that as it may, I think the evidence now

[3] The evidence now under consideration might be considered admissible in the discretion of the trial judge on the basis of long-standing federal precedents in actions at law. See, e.g., *Bouldin* v. *Massie*, 7 Wheat. 122, 153 (U. S., 1822) (evidence concerning a habit of never recording without a document of transfer admitted); *Chitwood* v. *United States*, 153 F. 551, 552 (1907) (evidence of habitual arrival of torn mail packages in prosecution for opening mail admitted); *Union Pacific R. R. Co.* v. *Owens*, 142 F. 2d 145, 146 (9 Cir., 1944) (evidence as to custom in complying with company's rule for ringing bell held admissible).

under discussion was admissible under the rules of evidence of the applicable state, New York.

New York courts generally exclude evidence of an individual's habits when offered to prove the doing on a specific occasion of the act which is the subject of the "habit." *Dubois* v. *Baker,* 1864, 30 N. Y. 369 (habit of carrying an inkstand held inadmissible to show that it was in his possession on a certain day); *Zucker* v. *Whitridge,* 1912, 205 N. Y. 50, 98 N. E. 209 (habit of looking both ways before crossing streetcar tracks inadmissible to show due care on day of injury); *Lefcourt* v. *Jenkinson,* 1940, 258 App. Div. 1080, 18 N. Y. S. 2d 160 (habit of opening door by pushing on glass panel held inadmissible to show lack of due care at time of accident); *Grenadier* v. *Surface Transportation Corp.,* 1946, 271 App. Div. 460, 66 N. Y. S. 2d 130 (evidence of two prior accidents of bus driver held inadmissible to show his negligence); *Warner* v. *New York Cent. R. Co.,* 1871, 44 N. Y. 465 (habit of intemperance of railroad flagman held inadmisible to show intoxication at a particular time). These cases involve the "habits" of individuals, rather than the group practice, routine, or custom of a corporate entity. Nearly all courts, including those of New York, treat this latter type of evidence—which is that involved here—much more favorably than evidence respecting the habitual responses of individuals. See, *e.g., Gray* v. *Siegel-Cooper Co.,* 1907, 187 N. Y. 376 (custom of those delivering freight to use defendant's elevator held admissible as bearing on defendant's negligence); *Shannahan* v. *Empire Engineering Corp.,* 1912, 204 N. Y. 543, 98 N. E. 9 (evidence of general usage and practice on tugboats

held admissible); *Thallheimer* v. *Brinckerhoff*, 1826, 6 Cow. (N. Y.) 101 (evidence of clerk's invariable custom to mail letters as soon as copied admitted to show that letter was sent). It should be noted that the evidence involved here was not admitted to show that the defendant had been negligent in general or that it had been negligent because it had not followed a custom generally in use in the particular industry. It was offered and received for the purpose of proving a particular fact, namely, that the condition of the path between tracks 9 and 10 was defective. Cf. *Eaton* v. *Bass*, 6 Cir., 1954, 214 F. 2d 896.

2. *Evidence of the Presence of Coal in the Yard in April, 1949.*

Several employees of the defendant testified that they had seen coal lying on the ground in various parts of the yard where the injury occurred during the month when the injury occurred. Evidence of general conditions throughout the yard certainly shed some light on the particular condition of the path at the place of the accident. I think that this evidence was clearly relevant. See *Popper* v. *City of New York*, 1953, 281 App. Div. 98, 117 N. Y. S. 2d 335; *Nicholas* v. *Bush & Denslow Mfg. Co.*, 1889, 53 Hun (N. Y.) 137, 6 N. Y. S. 601, aff'd *per curiam* 117 N. Y. 646.

3. *Evidence of Complaints to Safety Committee.*

One employee of the defendant was permitted to testify that in 1947 or 1948 complaints of litter in the yard had been made to a safety committee of the de-

fendant, of which he was a member. I agree with Judge Frank that this evidence was admissible as tending to show that the defendant had notice of the path between tracks 9 and 10. Moreover, I think the evidence was admissible under New York rules of evidence. See *Pettengill* v. *City of Yonkers,* 1889, 116 N. Y. 558, 22 N. E. 1095, where evidence of defects existing near the place where the injury occurred was held admissible. And New York apparently admits evidence of similar accidents or occurrences where the circumstances are shown to be similar, *Vogel* v. *Montgomery Ward,* 1949, 275 App. Div. 727, 86 N. Y. S. 2d 817, leave for appeal den. 299 N. Y. 800; or where such evidence tends to show notice, *Sandler* v. *Hemlock Estates,* 1951, 201 Misc. 429, 106 N. Y. S. 2d 315; *Binder* v. *Zelda Const. Corp.,* 1944, 51 N. Y. S. 2d 660.

4. *Evidence of Transfer of Maintenance Workers.*

Several of the defendant's employees were permitted to testify that several months prior to April, 1949, a substantial portion of the men available in the yard for cleanup operations had been transferred to do work in other places. One witness testified that, consequently, no cleanup work was performed during a period immediately prior to the injury. Judge Frank would admit this evidence as showing a habit of negligence on the part of the defendant. He rests this conclusion not on precedent, but on the enlightened view of Wigmore, McCormick, and the draftsmen of the Model Code of Evidence and the Uniform Rules of Evidence. Moreover, he intimates, I think erroneously, that we may formulate different and

more liberal rules of evidence in FELA cases than are applicable in other cases brought in federal courts. I think such a development would be unfortunate. Rules of evidence applicable in federal courts should not be compartmentalized according to the subject matter of the case involved. And the FELA is a substantive statute and does not contain or imply rules of evidence. See *Atlantic Coast Line R. Co.* v. *Dixon*, 5 Cir. 1953, 207 F. 2d 899, 903.

I do not think that this evidence relating to the transfer of railroad employees from the yard where the injury took place can be characterized as "habit" evidence. There was no testimony that this transfer of workers had been a regular routine. In order to be characterized as a "habit" or "custom" an act must have been repeated on a sufficient number of occasions so as to have become habitual, *i.e.*, a regular response to a given situation. See the Model Code of Evidence (A. L. I., 1942) Rule 307, and the Uniform Rules of Evidence (1953) Rule 50.

I would prefer to rest our affirmance of the admission of this evidence concerning the transfer of employees upon the more general ground of its logical relevance. It tended to round out the picture presented by the evidence discussed in point (3), *supra*, by showing that coal observed in the yard had no opportunity of being removed. Thus, it increased the plausibility of the plaintiff's version of the injury; that he stumbled over a large piece of coal lying on the path between tracks 9 and 10. As such, I concur with Judge Frank that the trial judge did not abuse his discretion in admitting it.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 1st day of March one thousand nine hundred and fifty-six.

Present:

HON. JEROME N. FRANK,
HON. CARROLL C. HINCKS,
HON. STERRY R. WATERMAN, *Circuit Judges.*

FRANK CERESTE,
Plaintiff-Appellee,

v.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

/s/ A. DANIEL FUSARO
Clerk